SHORT FORM ORDER

INDEX NO. 05-20337
CAL. NO. 06-02196-MV

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 11-8-06
ADJ. DATE 12-8-06
Mot. Seq. # 001 - MD

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EDGAR FLORES,

Plaintiff,

– against –

LINDA M. KNIGHT and LARSON AND SONS CONSTRUCTION CORP.,

Defendants.

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Upon the following papers numbered 1 to 31 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 13 - 29; Replying Affidavits and supporting papers 30 - 31; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants for summary judgment dismissing the complaint is denied.

Plaintiff Edgar Flores commenced this action to recover damages for personal injuries allegedly sustained in a motor vehicle accident that occurred at the intersection of Islip Avenue and Sycamore Street in the Town of Islip on November 11, 2004. Plaintiff alleges that the collision occurred when a vehicle owned by defendant Larsen & Sons Construction Corp. and driven by defendant Linda Knight made a left turn in front of his vehicle as it entered the intersection. By his supplemental bill of particulars, plaintiff alleges that he sustained various injuries to his neck, back and knee as a result of the accident, including bulging discs in his lumbar region at levels L5-L5 and L5-S1; cervical and lumbar radiculopathy; cervical and lumbar myofascial pain syndrome; and left knee effusion. Plaintiff, who did not seek medical treatment immediately after the accident, alleges that he missed three days of work due to his injuries.

Defendants now move for summary judgment dismissing the complaint, on the ground that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law §5210 (d). Defendants' submissions in support of the motions include copies of the pleadings, a transcript of plaintiff's deposition testimony, and sworn medical reports prepared by Dr. Arthur Bernhang, Dr. Alexander Rimalovski, and Dr. Jessica Berkowitz. At defendants' request, Dr. Bernhang, an orthopedist, and Dr. Rimalovski, a neurologist, examined plaintiff in July 2006 and reviewed medical records related to the alleged injuries. Dr. Berkowitz, a radiologist, conducted an independent review of an magnetic resonance imaging (MRI) scan of plaintiff's lumbar spine performed in January 2005. Plaintiff opposes the motion, arguing that defendants' submissions are insufficient to meet their burden on the motion. Alternatively, plaintiff argues that a triable issue of fact exists as to whether he suffered a spinal injury within the "significant limitation of use" category.

Insurance Law § 5102 (d) defines "serious injury" as "a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment."

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (*see*, ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, i.e., affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). A defendant also may establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see*, ***Fragale v Geiger***, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; ***Torres v Micheletti***, 208 AD2d 519, 616 NYS2d 1006 [2d Dept 1994]; ***Craft v Brantuk***, 195 AD2d 438, 600 NYS2d 251 [2d Dept 1993]; ***Pagano v Kingsbury***, *supra*). Once a defendant meets this burden, the plaintiff must present proof in admissible form which creates a material issue of fact or demonstrate an acceptable excuse for failing to meet the requirement of tender in admissible form (***Gaddy v Eyler***, *supra*; ***Pagano v Kingsbury***, *supra*; *see*, ***Grasso v Angerami***, 79 NY2d 813, 580 NYS2d 178 [1991]; *see generally*, ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). However, if a defendant does not establish a prima facie case that the plaintiff's injuries do not meet the serious injury threshold, the court need not consider the sufficiency of the

plaintiff's opposition papers (*see*, ***Burns v Stranger***, 31 AD3d 360, 819 NYS2d 60 [2d Dept 2006]; ***Rich-Wing v Baboolal***, 18 AD3d 726, 795 NYS2d 706 [2d Dept 2005]; *see generally*, ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

Defendants' submissions in support of the motion fail to establish prima facie that plaintiff did not sustain a serious injury as a result of the subject accident. The medical report by Dr. Bernhang states, in relevant part, that during range of motion testing of the cervical region, plaintiff exhibited 25 and 30 degrees of lateral flexion, and that the average for such movement is 43 degrees. It also states that during the straight leg raise test, which checks for sciatic nerve and nerve root involvement, was positive at 70 degrees and 75 degrees of hip flexion. Dr. Bernhang concludes that plaintiff suffered soft tissue injuries, which had fully resolved at the time of his independent examination, and that plaintiff has "no obvious orthopedic restrictions or disability causally related" to the subject accident. The medical report prepared by Dr. Rimalovski states, among other things, that range of motion testing of the spine was performed visually, and that plaintiff demonstrated full range of motion in her cervical region and normal forward flexion in her lumbar region.

Dr. Bernhang's report is insufficient to shift the burden of proof to plaintiff, as it fails to address the findings during his orthopedic examination that plaintiff suffers restricted joint function in the cervical and lumbar regions (*see*, ***DeLuca v Miceli***, __ AD3d __, 2007 WL 534548 [2d Dept, Feb. 20, 2007]; ***Eybers v Silverman***, __ AD3d __, 2007 WL 416541 [2d Dept, Feb. 6, 2007]; ***Brown v Motor Veh. Acc. Indem. Corp.***, 33 AD3d 832, 822 NYS2d 784 [2d Dept 2006]; ***Smith v Delacore***, 29 AD3d 890, 814 NYS2d 554 [2d Dept 2006]; ***Kaminsky v Waldner***, 19 AD3d 370, 796 NYS2d 175 [2d Dept 2005]). Likewise, the medical report by Dr. Rimalovski is insufficient to make a prima facie case, as the degrees of spinal function attributed to plaintiff were not objectively measured with a medical device such as a goniometer or an inclinometer, but were visually estimated during range of motion testing (*see*, ***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]; ***Kauderer v Penta***, 261 AD2d 365, 689 NYS2d 190 [2d Dept 1999]). In addition, Dr. Rimalovski failed to evaluate the amount of extension, lateral flexion, and rotation in plaintiff's lumbar spine. Accordingly, defendants' motion for summary judgment dismissing the complaint based on plaintiff's failure to meet the serious injury threshold is denied.

Dated: MAR 0 6 2007

J.S.C.

__X__ **FINAL DISPOSITION** _____ **NON-FINAL DISPOSITION**